Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN,
Petitioners

V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ANNETTE REGAN LOYD
Texas State Bar No. 16731100
Reynolds & Pennington, L.L.P.
2900 Bank One Tower
500 Throckmorton Street
Fort Worth, TX 76102
Telephone: (817) 332-8850
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Attorney for Petitioners

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Fort Worth, TX 76102
Telephone: (817) 332-8850
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Attorney for Petitioners

THE QUESTIONS PRESENTED FOR REVIEW

1. Was a final judgment entered in the condemnation action?

2. Did the United States District Court improperly dismiss for lack of subject matter jurisdiction, **without a hearing**, Petitioners' *Answer and Election*, as amended and supplemented, whereby Petitioners sought to appear in the condemnation action and to exercise rights of revestment granted by the Government and filed of record in the condemnation action, when remaindermen (members and predecessors of Petitioners) had **no notice** of and **were not named as parties** to the condemnation action?

3. If a final judgment was entered, does *Fed. R. Civ. P. 60(b)* grant standing to remaindermen and their successors, holding an interest in lands that are subjects of a condemnation action filed by the United States of America, to move to appear in the original condemnation action and to move to exercise rights of revestment granted by the Government and filed of record in the original

condemnation action, when the remaindermen had **no notice** of and **were not named as parties** to the condemnation action?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE FIFTH CIRCUIT COURT OF APPEALS

The United States of America, Respondent, specifically the following Departments and Bureau:

State Department of the United States of America
7226 Main State Bldg.
2201 C St. NW
Washington, D.C. 20520

Department of Justice
Honorable Janet Reno
Attorney General of the United States of America
10th St. & Constitution Avenue, NW
Washington, D.C. 20530

United States Attorney for the Southern District of Texas
3000 Federal Bldg. & U.S. Courthouse
515 Rusk St., P.O. Box 61129
Houston, TX 77208-1129

Charles Wendlandt
Assistant United States Attorney for
the Southern District of Texas
Wilson Plaza, Suite 1400
606 No. Carancahua
Corpus Christi, TX 78476

United States Department of the Interior
Bureau of Land Management
6151 Main Interior Bldg.
1849 C St. NW
Washington, D.C. 20240

Bank One, Texas, N.A., Petitioner
P. O. Box 2605
Fort Worth, TX 76113-2605

The parent company of Bank One, Texas, N.A. is:
Bank One, Ohio, N.A.
100 East Broad Street
Columbus, Ohio 43215

Beatrice Cox Harris, Petitioner
Box 571073
Houston, TX 77257-1073

Linda Harris Beard, Petitioner
1903 Cena Drive
Brenham, TX 77833

Margie Harris Newtown, Petitioner
9158 Drumcliffe
Dallas, TX 75231

John McMullen, Jr., Petitioner
1612 Gaston Avenue
Austin, TX 78703

Andy J. McMullen, Petitioner
P. O. Box 706
Hamilton, TX 76531

Attorneys of Record for the Parties to the action before the Fifth Circuit Court of Appeals:

Charles Wendland, attorney for Respondent
Assistant U.S. Attorney
Wilson Plaza, Suite 1400
606 N. Carancahua
Corpus Christi, TX 78476

Annette Regan Loyd
H. Allen Pennington, Jr., attorney for Petitioners
Reynolds & Pennington, L. L. P.
2900 Bank One Tower
500 Throckmorton Street
Fort Worth, TX 76102

Dated this 30th day of January, 1998.

Annette Regan Loyd
Attorney of Record for Petitioners,
Bank One, Texas, N.A., Trustee of the
Red Crest Trust; Lelia Beatrice Cox
Harris; Linda Harris Beard; Margie
Harris Newtown; John H. McMullen,
Jr.; and Andy J. McMullen

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V.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN (jointly referred to herein as "Bank One Group") respectfully pray that a Writ of Certiorari issue

to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on September 17, 1997.

OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS BELOW

The September 17, 1997 opinion of the Court of Appeals, herein sought to be reviewed, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at A). The November 3, 1997 Order of the Court of Appeals denying Petitioners' *Petition for Rehearing* is unpublished and is reprinted in the separate *Appendix* to this Petition (at E). The prior *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at B). The prior *Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at C). The prior *Memorandum and Order* of the District Court entered in this action on January 30, 1997, is unpublished and is reprinted in the separate *Appendix* to this Petition (at D).

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The Judgment of the Court of Appeals was entered September 17, 1997. On November 3, 1997, the Court of Appeals denied Petitioners' *Petition for Rehearing*. The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1)*.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED IN THE CASE, SET OUT VERBATIM WITH APPROPRIATE CITATION

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

28 U.S.C. § 1254

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

V.T.C.A. Civil Practice & Remedies Code

§ 17.002. Suit Against Estate For Land Title

In a suit against the estate of a decedent involving the title to real property, the executor or administrator, if any, and the heirs must be made parties defendant.

V.T.A.S. Probate Code

§ 37. Passage of Title Upon Intestacy and Under a Will

When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law; . . .

FEDERAL RULES OF CIVIL PROCEDURE

RULE 17(a) See *Appendix* at L

RULE 17(b) See *Appendix* at L

RULE 17(c) See *Appendix* at L

RULE 54

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an

express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

RULE 55

(b) Judgment. Judgment by default may be entered as follows:

. . .

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

RULE 60

(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a

bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 71A(c)(d) & (f) See *Appendix* at L

Public Notice 131; Delegation of Authority 73 from the Department of State, signed by John Foster Dulles, Secretary of State, dated October 19, 1953, which appears on page 6806 of Volume 18, Number 211 from the *Federal Register*, dated October 28, 1953
See *Appendix* at K

TERMS OF REFERENCE

In the interest of brevity, the following terms of reference in addition to "Bank One Group", are employed:

1. "the action" refers to Civil Action No. 529, also referred to as Civil Action L-529, the proceedings in the District Court in this case;

2. "the Bank" refers to the Fort Worth National Bank of Fort Worth, Texas;

3. "the Corporation" refers to McMullen Oil & Royalty Company, Inc., a Texas Corporation;

4. "the Government" refers to the United States of America;

5. "Langille Trust" refers to the Susie McMullen Langille Testamentary Trust;

6. "Langille Will" refers to the probated Will and Codicil of Susie McMullen Langille;

7. "Remaindermen" refers to Glenn Harris, Jr.; John H. McMullen, Jr. and Andy J. McMullen, who were and are the heirs of the body of the children of Susie McMullen Langille;

8. "Rule 60(b) Motion" refers to *[Bank One Group's] First Amended Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules Of Civil Procedure, [Bank One Group's] Brief in Support . . .*, and *[Bank One Group's First through Fifth] Supplement[s] to [Its] Amended Motion . . .* and *Brief[s] in Support Thereof*;

9. "subject parcels" refers to the lands in which Bank One Group presently claims a 1/16th mineral interest, which are the subjects of this case;

10. "Trustee" refers to Bank One, Texas, N.A., Trustee of the Red Crest Trust.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Identification of Property in Which Bank One Group Claims an Interest

The following is a listing of the subject parcels.

No. assigned to parcel in the action	No. of acres in parcel	Location within Porciones 14,15, 16, 17 in Zapata Co., Texas
Z-27-A	225.521	all Share No.28-A
Z-30-A	286.883	Share No. 21
Z-32-A	122.94	Share No. 20
Z-36-A	10.750	Share No. 39
Z-37-A	58.206	Share No. 26
Z-54.1-A1	27.420	Share No. 23
Z-54.1-A2	69.080	Share No. 23
Z-54.2-A	144.780	Share No. 23
Z-62-A	137.917	Share No. 18A

Statement of the History, Nature and Extent of the Interests Claimed by Bank One Group

In 1926, Judgment was entered by the 49th District Court of Zapata County, Texas, partitioning Porciones 14, 15, 16 and 17 into

shares. Shortly after the partition, certain owners of shares conveyed a 1/16th mineral interest to M. J. Raymond, a Laredo attorney, apparently in payment for legal services rendered in connection with the partition action, by general warranty deeds.

By Mineral Deed dated April 15, 1927, M. J. Raymond conveyed to H. J. McMullen the undivided 1/16th mineral interests. This conveyance was also in the form of a general warranty deed.

In 1928, H. J. McMullen executed a conveyance to McMullen Oil & Royalty Company, Inc. ("the Corporation" herein). This conveyance provides that its purpose and intention is

> to entirely divest H. J. McMullen of all right or control over the oil, gas or other minerals in the property described in this instrument, save and except the right to receive the royalty oil, gas and other minerals, or the moneys payable from the sale thereof, and it is the purpose and intention of this instrument to vest in McMullen Oil & Royalty Company, Inc., the full right, in its own name to execute oil, gas and mining leases on the oil, gas or mineral interest or [sic] land now or hereafter owned by H. J. McMullen or standing in his name, in Zapata County, to such persons, firms or corporations as it may deem best and on such terms and for such bonus moneys and delay rentals as it may deem best, and that all such cash payments, bonus moneys and delay rentals shall be paid to McMullen Oil & Royalty Company, Inc., and H. J. McMullen, his heirs, representatives and assigns shall never have any interest therein nor in any way be entitled to any part

thereof.

H. J. McMullen died in 1934, leaving a will which was probated, which left his assets to Susie McMullen, his widow (later Susie McMullen Langille).

No Notice of the Condemnation Was Served on the Corporation

The Corporation was named as a defendant by the Government in the action, as an owner of the subject parcels. The Corporation was never dismissed as a Defendant. Although it was listed as being a Texas Corporation, with its office located in Fort Worth, Texas, the Corporation was never served with notice of the action.

The executive right and the right to receive bonuses and delay rentals from the subject parcels were owned by the Corporation from 1928 until the Corporation was dissolved in 1966. At that time (the dissolution), the remainder interests in what had been the Corporation's rights in the subject parcels vested directly in Remaindermen. Then, pursuant to Langille Will, so long as a child of Susie McMullen Langille survived, possession and the right to present enjoyment of the executive right and the right to

receive bonuses and delay rentals in the subject parcels were in the Langille Trust. Upon the termination of the Langille Trust, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were vested in Remaindermen. *Logan v. Logan*, 156 S.W.2d 507, 512 (Tex. 1941); *Heinzman v. Coon*, 290 S.W.2d 219, 221 (Tex. 1956).

Non-joinder of, and No Notice to, Remaindermen of Susie McMullen Langille Will

Susie McMullen Langille, the widow of H. J. McMullen, left a Will dated October 20, 1938 (*Appendix* at G), and a Codicil to said Will dated November 3, 1938 (*Appendix* at H). Langille Will provided for the creation of a testamentary trust, Langille Trust, to be administered by The Fort Worth National Bank of Fort Worth, Texas. Provisions III. H and I, appearing on page 9 of the Will provide:

> H. If either of my two children shall predecease me, or at the death of either of my children, after my death, the interest of such deceased child in the Trust Estate herein created, both as to net income and as to principal, shall go to and be for the use and benefit of the survivor.

> I. At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

Upon the probate of Langille Will, Remaindermen were vested with a remainder interest in the subject parcels because Glenn Harris, Jr., a Remainderman, was alive during the lifetime of Susie McMullen Langille. He lived until the late 1980's.

Upon the death of Mrs. Paul Bowden, a/k/a Jeannie A. Hall (the last surviving child of Susie McMullen Langille) in December, 1984, Remaindermen became vested with possession and enjoyment of the subject parcels, free of trust. Remaindermen's interests were as follows: Glenn Harris, Jr., one-half (l/2); John H. McMullen, Jr., one-fourth (1/4); and Andy J. McMullen, one-fourth (1/4). Remaindermen were all of Susie McMullen Langille's grandchildren. John H. McMullen, Jr. was born in 1944. Andy J. McMullen was born in 1948. No one appeared on Remaindermen's behalf in the action prior to 1995, when Bank One Group filed a Rule 60(b) Motion in the action.

Glenn Harris, Jr.; John H. McMullen, Jr.; and Andy J.

McMullen were settlors of Red Crest Trust. In 1985, the Settlors transferred mineral and royalty interests in the subject parcels to Texas American Bank/Fort Worth, N.A., as Trustee of the newly created Red Crest Trust. In 1989, the Federal Deposit Insurance Corporation, as receiver, transferred the trust assets of Texas American Bank/Fort Worth, N.A. to Team Bank. Team Bank merged into Bank One, Texas, National Association in 1992. Accordingly, Bank One, Texas, National Association is the duly constituted Trustee of the Red Crest Trust. Therefore, Bank One Group stands in the position of Remaindermen.

Lelia Beatrice Cox Harris, Linda Harris Beard and Margie Harris Newtown are the widow and children, respectively, of Glenn Harris Jr., who died after the creation of Red Crest Trust.

Remaindermen were not named as parties in the action, received no notice of the action, nor was a guardian ad litem or attorney ad litem appointed by the Court to represent their interests in the action. They also had no notice of their right to retain their oil and gas and mineral interests under the subject parcels, as created by the Government's *Amended Petition in Condemnation*

No. 3, as supplemented by the Government's *Amended Petitions in Condemnation No[s]. 4* through *14* (specifically Paragraph 1 of *Amended Petition in Condemnation No. 12*, filed March 6, 1956) in the action. (See *Appendix* at I and J).

Such right of election had no limit on its duration and was never withdrawn by the Government.

On March 14, 1960, the Government filed a brief consisting of seventy-two (72) pages in the action, entitled *Plaintiff's Brief Covering The Taking of The Negative Easement Estates Affecting The Minerals Only, Before the Special Commission.* In this brief, the Government discussed the history of the mineral estates located within the Falcon Dam and Reservoir. Excerpts follow:

> Declaration of Taking No. 1 in Civil Action No. 529 was filed on January 3, 1950, and the fee simple title was sought to all lands lying below a "325 foot elevation traverse",. . .
>
> Amendment No. 3 was a complete amendment and amounted to a new Petition in Condemnation for all practical purposes
>
> There was a change of attitude indicated by the filing of Amendment No. 3, as reflected in these words: "In all of the other lands in Tracts A and A-2, the fee simple estate, provided, however that the owners of the oil and gas in and under said tracts may, at their

election, retain title to said oil and gas, subject to the terms of the negative easement. . . provided, however that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from locations above the 325-foot elevation traverse . . .".

. . . Not only were the minerals returned in the basin of the reservoir, but the partial negative easement drilling restriction was eliminated from the top of the earthern wings of the dam at elevation 325 down to the actual top of the steel gates at the 307-foot elevation, subject only to a flowage easement from the 307 to the 314-foot elevation traverses.

The Notice, which was served on the Bank, only advised:

You are hereby notified that a complaint in condemnation and amendments thereto have heretofore been filed in the office of the Clerk of the above named Court in an action to condemn the following defined estates:

. . .

The fee simple title absolute to those parcels of land, the numbers of which have the letter "A" as a suffix, for example, Z-1-A, Z-31-A1; and portions of the following parcels: Z-30-AB, Z-34-AB through Z-37-AB, Z-40-AB, Z-52.1-AB, Z-55-AB, Z-60-AB through Z-62-AB, subject to existing easements for public utilities and public highways.

No notice was given to the Bank of the right of revestiture which had been created by *Amended Petition in Condemnation No. 3*, which had been filed almost four years prior to the issuance of the

Notice to the Bank.

Only with the filing of *Amended Petition in Condemnation No. 12*, did the right of revestiture in the Corporation, Langille Trust and Remaindermen become known. The caption of *Amended Petition in Condemnation No. 12* states "Additional Parties for all Parcels". Unfortunately, the Bank received no notice of the filing of *Amended Petition in Condemnation No. 12*, which was filed after the Bank had been served with notice and had failed to appear.

Revestitures were in fact entered regarding the oil and gas and the mineral estates for all of the subject parcels. Stipulations were entered into between the Government and individuals having an obligation to H. J. McMullen, his heirs and assigns, to warrant and defend title to the 1/16th mineral interests in the subject parcels. Specifically, the Stipulations were entered into between the Government and the grantors to M. J. Raymond of the 1/16th mineral interests in the subject parcels, or such grantors' heirs/devisees.

The Judgments upon such Stipulations found that oil and gas would be excepted from condemnation, but provided for a negative

easement in favor of the Government to control the methods of drilling or deepening of any well for the purpose of producing oil and/or gas. The negative easement basically permitted directional (slant) drilling. Many of the Judgments upon such Stipulations **completely revested the mineral estates** of portions (sub-parcels) of the subject parcels in their former owners in fee simple (such revested sub-parcels being located between the 307 and 325 feet contour elevations).

The United States Commissioner of the International Boundary and Water Commission, United States and Mexico, acting for and on behalf of the Secretary of State of the United States of America (see *Appendix* at K), amended *Declaration of Taking No. 1* in Civil Action No. 529 by filing a map entitled *Supplement-4 to Exhibit C to Declaration of Taking No. 1* ("The Map"), which was filed on November 29, 1995 in the record of this action, but not given a docket number.

The following sub-parcels, carved out of the subject parcels, appear on The Map:

TRACT 1. Those Sub-Parcels vested in the Government in fee simple, **save and except oil and gas**:

No. 27	217.181 acres
No. 30.1	144.280 acres
No. 30.2	51.313 acres
No. 32	88.56 acres
No. 37	29.776 acres
No. 54.1 [1]	183.09 acres
No. 62.1	15.698 acres
No. 62.2	7.819 acres

[1] Consists of 40.46 acres out of Parcel Z-54.l-A2 and 142.63 acres out of Parcel Z-54.2-A

TRACT 2. Those Sub-Parcels revested in the former owners, subject to Flood Easement:

No. 27.1F	1.82 acres
No. 27.2F (referred to as 27.3-F in Judgment of Revestiture)	6.52 acres
No. 30-F	56.00 acres
No. 32.1-F	4.43 acres
No. 32.2-F	25.81 acres
No. 36-F	3.00 acres
No. 37.1F	2.28 acres
No. 37.2-F	16.07 acres
No. 54.1-F	16.54 acres
No. 54.2-F [2]	4.29 acres
No. 54.3-F	16.91 acres
No. 62-F	41.98 acres

[2] Consists of 2.14 acres out of Parcel Z-54.l-A2 and 2.15 acres out of Parcel 54.2-A

TRACT 3. Those Sub-Parcels revested in former owners, subject only to existing highway and utility easements:

No. 30-R	127.79 acres
No. 32-R	289.28 acres
No. 36-R	93.98 acres
No. 37-R	224.66 acres
No. 54-R	100.93 acres
No. 62.1-R	401.34 acres
No. 62.2-R	2.52 acres

2. COURSE OF PROCEEDINGS AND DISPOSITION IN DISTRICT COURT BELOW

In December 1949, the Government filed *Petition in Condemnation* in the action. In January 1950, the Government filed *Declaration of Taking No. 1*, which covered all interests which are the subject of this *Petition for Writ of Certiorari* and other substantial interests.

On December 22, 1955, Fort Worth National Bank was served with notice of the action. At that time the Bank was serving as Trustee of the Susie McMullen Langille Testamentary Trust ("the Langille Trust" herein). The Bank never appeared in the action.

The Corporation was named as a party in the action, but it was never personally served with notice.

After the Bank was served and failed to appear, on the 6th day of March, 1956, the Government filed an *Amended Petition in Condemnation No. 12* which stated specifically that Susie McMullen Langille, who died in 1938, and the Corporation may elect to retain title to the oil and gas in the subject parcels, subject to the terms of the negative easement. Remaindermen were not mentioned in this Amended Petition nor were they given any notice of same. No one appeared upon their behalf in the action, and neither an attorney ad litem or guardian ad litem was appointed to represent their interests.

The Bank never received notice of the right of revestment.

The right of the Bank, as Trustee of the Langille Trust, to receive revestment of its interests in the subject parcels was never dismissed or disposed of in the action.

Upon learning of the Government's leasing activities with regard to the subject parcels, Bank One Group promptly filed a *Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure* in the action on July 31, 1995. Bank One Group filed its Amended Rule 60(b) Motion on October 10, 1995, and a

Brief in support of same on October 10, 1995.

Bank One Group filed *Supplements to [its] Amended [Rule 60(b) Motion] and Brief in Support Thereof* as follows:

Supplement No.	Date of Filing
First	Nov. 17, 1995
Second	April 15, 1996
Third	July 16, 1996
Fourth	Nov. 1, 1996
Fifth	Dec. 20, 1996

Bank One Group filed its *Answer and Election* to retain title to oil and gas in the subject parcels in the action on November 17, 1995.

Bank One Group filed Supplements to its *Answer and Election* as follows:

Supplement No.	Date of Filing
First	April 15, 1996
Second	July 16, 1996

The Government filed its *Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction* on March 26, 1996. Bank One Group filed its *Response to [the Government's] Motion to Dismiss . . . for Lack of Subject Matter Jurisdiction* on April 15, 1996.

On December 7, 1996, the Court entered its *Memorandum and Order* which granted *[the Government's] Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction.*

On December 19, 1996, Bank One Group filed a *Motion Pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend the Court's Memorandum and Order Granting [the Government's] Motion to Dismiss Claims of [Bank One Group] for Lack of Subject Matter Jurisdiction.*

On January 30, 1997, by *Memorandum and Order*, the District Court denied Bank One Group's Motion to Alter or Amend the Court's Order of December 7, 1996.

3. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had subject matter jurisdiction pursuant to *Fed. R. Civ. P. 55(b)(2) and (c), 60(b)(4) and (6) and 71A. Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, at 18 (1984); *Catlin v. United States*, 324 U.S. 229, 241 (1945).

ARGUMENT FOR ALLOWANCE OF THE WRIT

Questions 1 and 2 Presented for Review

Summary. The Judgment of the Court of Appeals below is in conflict with decisions of United States Courts of Appeals for the Eighth Circuit and the Ninth Circuit regarding the requirement of a direction for the entry of a final judgment upon one or more but less than all of the claims upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. ***Fed. R. Civ. P. 54(b); Burkart v. United States, 210 F.2d 602, 605 (9th Cir. 1954)*****; Tyson v. State of Iowa, 283 F.2d 802, 805 (8th Cir. 1960).**

The Government's *Petition in Condemnation* and *Declaration of Taking No. 1* in the action both named 'McMullen Oil & Royalty Co., Inc. ("the Corporation"), a Texas corporation with its principal place of business at Ft. Worth, Tarrant County, Texas,' as a purported owner of all of the subject parcels. The Government likewise named "Ft. Worth National Bank, Executor and Trustee under the will of Susie McMullen Langille deceased"

as a purported owner, in the action.

The Corporation was never served with notice of the action. Although the Bank was named as a party defendant, Remaindermen, devisees under Langille Will, were not named or served. No one appeared in the action, prior to 1995, to represent the interests of the Corporation, the Bank or Remaindermen, nor was an attorney ad litem or guardian ad litem appointed to represent and protect the interests of Remaindermen.

The Government was required to give notice to the parties affected, by personal service, of the filing of the amended petitions in condemnation that created the rights of election to retain oil and gas and mineral estates in the subject parcels. *Fed. R. Civ. P. 71A(d) and (f).* Notice of the stipulation of rights of revestment, specifically provided for in the Corporation and in Susie McMullen Langille, was never given or attempted to anyone entitled to exercise those rights of election. The Government never dismissed its amended petitions in condemnation which provided for such rights of election in the Corporation and Susie McMullen Langille. **No judgment in the action contains a direction for the entry of**

a final judgment upon one or more but less than all of the claims upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. Such wording was required, commencing in 1946, following the amendment of Fed. R. Civ. P. 54(b), in order to create a final judgment upon one or more but less than all of the claims in a case. *Burkhart v. United States*, supra; *Tyson v. State of Iowa*, supra; *Garrett v. United States*, 407 F.2d 146, 151 (8th Cir. 1969) quotes *Sears, Roebuck & Co. Mackey*, 351 U.S. 427, 435, 436 (1956); 6 *Moore's Federal Practice* § 54.28(2), et seq., at pp. 54-97; *Zapata Gulf Marine Corporation v. Puerto Rico Maritime Shipping Authority*, 925 F.2d 812, 814 (5th Cir. 1991); cert. denied, 111 S.Ct. 2917; *Dibidale of Louisiana v. American Bank and Trust Co.*, 916 F.2d 300, 304 (5th Cir. 1990).

No judgment was ever entered in the action which dismissed or disposed of the Bank's right of revestiture. Therefore, no final judgment was entered in the action because awarding of other relief remained to be resolved. *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976).

The *Order Closing Civil Action*, filed August 10, 1970, was expressly made "subject, however, to the power of the Court to make such future Orders, if any, as may be necessary." (*Appendix* at F)

Therefore, no final judgment was entered in the action; and Petitioners were entitled to file their *Answer* in the action and to file their *Election* in the action to retain, or be revested with, their oil and gas interests and mineral interests in the subject parcels.

Question 3 Presented for Review

Summary. The judgment of the Court of Appeals below is in conflict with a decision of the United States Court of Appeals for the Second Circuit. In *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982), that Court held that persons such as the Petitioners in this case, who are sufficiently connected and identified with the original proceedings, are entitled to standing to attack those proceedings utilizing a proceeding under *Fed. R. Civ. P. 60(b)*.

Remaindermen were vested in the title to the subject parcels upon the probate of Langille Will in 1938. *McGill v. Johnson*, 799

S.W.2d 673, 675, 677 (Tex. 1990); *Chadwick v. Bristow*, 146 Tex. 481, 208 S.W.2d 888, 891 (1948); *Bufford v. Holliman*, 10 Tex. 560, 575 (1853); *V.A.T.S. Probate Code, § 37*; *Rust v. Rust*, 211 S.W.2d 262, 267 (Tex.Civ.App.-Austin 1948), aff'd 147 Tex. 181, 214 S.W.2d 462 (Tex. 1948). Lewis M. Simes and Allan F. Smith, *The Law of Future Interests*, Second Edition (1956) Vol. 2, p. 126 § 658 states:

> Whenever there is a preceding estate for life or for years or a preceding trust to pay the income to someone other than the members of the ultimate class of beneficiaries, that fact could be used to justify a holding that the ultimate gift is vested.

A life estate with power of sale is still only a life estate. An unexercised power of sale leaves both the life and remainder estates unaffected. *Calvert v. Thompson*, 339 S.W.2d 685 (Tex.Civ.App.-Austin 1960, writ ref'd); *Rekdahl v. Long*, 417 S.W.2d 387, 392 (Tex. 1967).

Fed. R. Civ. P. 71A(f) required that Remaindermen be given notice of the filing of the action and of the *Amended Petitions in Condemnation*, which provided for <u>their</u> right of election to retain the subject parcels.

Two of the Remaindermen, John H. McMullen, Jr. and Andy J. McMullen, who were vested in the remainder interest in the subject parcels, were small children when the *Petition in Condemnation* was filed. Neither of these Remaindermen were named as parties in the action, neither received notice, no one appeared on their behalf, nor was an attorney ad litem or guardian ad litem appointed to represent their interest before the Court.

Fed. R. Civ. P. 17(c) provided in part:

> The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Fed. R. Civ. P. 55(b)(2) states

> no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative **who has appeared therein**. (emphasis supplied)

Fed. R. Civ. P. 55(c) provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, **may likewise set it aside in accordance with Rule 60(b). (emphasis supplied)**

Fed. R. Civ. P. 71A(c) provides, in part:

> Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned.

Fed. R. Civ. P. 71A(d)(1) provides, in part "Additional notices directed to defendants subsequently added shall be so delivered."

Remaindermen were so identified as a class in the Langille Will, with which the Government was obviously familiar.

Fed. R. Civ. P. 17(a) provides that the trustee of an express trust may sue in the name of the Trustee, without joining the party for whose benefit the action is brought.

However, *Fed. R. Civ. P. 17(b)* provides that capacity to be sued shall be determined by the law of the state of the individual's domicile or in which the district court is held. All Remaindermen were domiciled in the State of Texas.

At the time of the commencement of the action, *Texas*

Revised Civil Statute Ann. Art. 1982, entitled *For Lands Against Decedents*, provided:

> In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. *[Acts 1925*, S.B. 84]

This same language is now *V.T.C.A. Civil Practice & Remedies Code § 17.002*. This principal has been a part of the statutory law of Texas since *Acts 1870*, page 173.

In this statute, the term "heirs", by judicial construction, has been determined to include devisees. *Grohn v. Marquardt*, 487 S.W.2d 214, 217 (Tex. Civ.App.-San Antonio 1972, writ ref'd n.r.e.).

The failure to comply with *Article 1982* in the action, which named Susie McMullen Langille as a party, subjected the action to subsequent attack by Remaindermen. *Lowman v. Falsetti*, 335 F.2d 632, 638 (5th Cir. 1964); certiorari denied, 85 S.Ct. 659, 379 U.S. 966, 13 L.Ed.2d 560; *Jones v. Gibbs*, 133 Tex. 645, 130 S.W.2d 274, 275 (1939); *Allen v. Matthews*, 210 S.W.2d 849, 851 (Tex.Civ.App.-Austin 1948, writ ref'd n.r.e.), finding judgment void; *East v. Dugan*, 79 Tex. 329, 15 S.W. 273,275 (1891).

All proceedings taken in the action, which relate to the interests of the Corporation and of Remaindermen and which relate to the valuation of their interests in the subject parcels, are void as being violative of their rights to due process and to equal protection, provided for under the *Fifth Amendment to The United States Constitution.*

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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Annette Regan Loyd
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ATTORNEY FOR PETITIONERS

Supreme Court, U.S.
FILED
97 1264 JAN 29 1998
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN, Petitioners

V.

UNITED STATES OF AMERICA, Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Attorneys for Petitioners

90 pp

NO. _____

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

A - Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, filed September 17, 1997, sought to be reviewed Fifth Circuit Order

B - *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1996

Vol. 2, Dkt. 42

C - *Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1996

Vol. 2, Dkt. 43

D - *Memorandum and Order* of the United States District Court for the Southern District Of Texas, Laredo Division, entered January 30, 1997

Vol. 1, Dkt. 55

E - Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit, filed November 3, 1997

Fifth Circuit Order

F - *Order Closing Civil Action* filed August 10, 1970, in the United States District Court for the Southern District of Texas, Laredo Division

Vol. 4, Dkt. 15, p. 344

G - Will of Susie McMullen Langille

Vol. 3, Dkt. 22, p. 502

H. Codicil to Will of Susie McMullen Langille

Vol. 3, Dkt. 22, p. 496

I. Relevant Portions of *Amended Petition in Condemnation* No. 3

Vol. 4, Dkt. 15, p. 368

J. Relevant Portions of *Amended Petition in Condemnation No. 12*

Vol. 4, Dkt. 15, p. 353

K. Copy of Public Notice 131; Delegation of Authority 73 from the Department of State, Signed by John Foster Dulles, Secretary of State, dated October 19, 1953, which appears on page 6806 of Volume 18, Number 211 from the *Federal Register*, dated October 28, 1953

Vol. 4, Dkts. 13-14

L. Federal Rules of Civil Procedure Involved in the Case which Are Too Lengthy for Inclusion in the Body of the Petition

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APPENDIX A

Opinion and Judgment of the United States
Court of Appeals for the Fifth Circuit,
Filed September 17, 1997,
sought to be reviewed,
(Fifth Circuit Order)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-40149

Summary Calendar

UNITED STATES OF AMERICA

Plaintiff - Appellee

versus

85,237 ACRES OF LAND, MORE OR LESS, ET AL

Defendants,

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red
Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H MCMULLEN, JR; ANDY J MCMULLEN

Defendants - Appellants

Appeal from the United States District Court
For the Southern District of Texas

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[1]

Appellants appeal the trial court's dismissal of their Rule 60(b) motion. We affirm.

I.

Appellants assert that the district court reached two erroneous legal conclusions. First, the Order Closing Civil Action, entered August 10, 1970, was a final judgment in this civil action. Second, a Quiet Title Act claim is an adverse claimant's exclusive means to challenge the United States' title to real property. We find Appellants' objections to these determinations to be without merit and therefore affirm the lower court' s dismissal of their Rule 60(b) motion.

II.

On August 10, 1970, the district court entered in this case an Order Closing Civil Action.[2] R. Vol. 4 at 344. The Order stated:

"all matters and controversies have been adjudicated in the .

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[1] Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2] We make no ruling on whether the Judgment Confirming Award of Special Commission and Report of Special Master entered on July 26, 1956 was a final judgment in this suit. It is clear that the Order Closing Civil Action was a final judgment in this case.

> . . civil matter . . . and . . . it is . . . ORDERED that the above captioned civil action be and is hereby CLOSED and DROPPED from the Docket of the Court; subject, however, to the power of the Court to make such future Orders, if any, as may be necessary. Id.

Appellants argue that the last phrase of the order denies finality to the judgment since the trial court reserved the power to make any necessary future orders. We find this argument to be totally lacking.

The "requirement of finality is to be given a 'practical rather than a technical construction.'" Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964)(quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). It is well settled that a "final judgment" may not be the last possible order in a case. Gillespie, 379 U.S. at 152. The Order Closing Civil Action of August 10, 1970 adjudicated all the controversies with respect to all of the parties in the civil action. The last phrase of the order does not negate its finality.

Appellants next assert that a final judgment was never entered In this case because no notice of the condemnation proceeding was served on the remaindermen of the Langille Trust or on the Corporation.[3] We find this argument to be unavailing as well.

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[3] For the sake of clarity and brevity, we adopt the lexicon of Appellants to refer to the various entities and concerns in this case. See Appellants' Brief at 5.

Assuming that Appellants' are correct in their assertion that neither the remainder beneficiaries nor the Corporation received notice of the condemnation proceeding,[4] the Order Closing Civil Action is nonetheless a final judgment. Since they did not receive notice and did not voluntarily appear in the proceeding, the remaindermen and Corporation never became parties to the civil action.[5] Nagle v. Lee, 807 F.d.. 435 (5th Cir. 1987). This absence of notice does not negate the finality of the district court's order of August 10, 1970 since this order resolved all controversies with respect to all persons who were parties to the suit. Id.

Finally, Appellants aver that the Order Closing Civil Action was not a final judgment because the Bank never received notice of the United States' Amended Petition in Condemnation which gave the owners of the subject parcels the right to elect to revest the mineral interests in themselves, subject to certain restrictions which are not of

---

[4] In order to dispose of this appeal, it is unnecessary for us to decide whether the remaindermen or the corporation had notice of the civil action. We make no ruling on this issue. Rather, we will assume that Appellants' contention is true that these persons did not have notice of the condemnation proceeding.

[5] We do not decide the interest the remaindermen or corporation had in the subject parcels.

importance here. Any interest Appellants claim in the property through the Bank is nugatory. As Appellants admit, the Bank received adequate notice of the condemnation proceeding but failed to respond or appear in the action. By its inaction, the Bank waived any defense or objection it may have had to the taking or any right or benefit it may have received during the course of the proceeding. Fed. R. C.V. P 71A(e). After receiving notice, the Bank, as trustee of the Langille Trust, had a duty to keep abreast of the developments in the condemnation suit. The Bank's dereliction in its duty does not tarnish the finality of the district court's Order Closing Civil Action.

III.

Appellants claim that the trial court erred in ruling that the exclusive means to challenge the United States' title to real property is a suit under the Quiet Title Act, 28 U.S.C. § 2409a (1994). By this ruling, the district court dismissed Appellants Rule 60(b) motion for lack of subject matter jurisdiction. Though the court below in its order cast the net wider than necessary, we find that it reached the correct result.

Appellants contend that they were entitled to file a Rule 60(b)

motion attacking the district court's final judgment since the remaindermen of the Langille Trust never received notice of condemnation proceeding.[6] Appellants misunderstand the effect of the lack of notice to the remaindermen.

As we stated, since the remaindermen did not receive notice and did not voluntarily appear in the suit, they were not parties to the condemnation action.[7] Contrary to Appellants' belief,[8] the law of this circuit establishes that non-parties to a federal eminent domain suit must assert their claims to the condemned property via an independent action against the United States, not by a Rule 60(b) motion. Screven v. United States, 207 F.d. 740, 741 (5th Cir. 1953). The lack of notice

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[6] Again, we assume, without deciding, that the remaindermen did not have notice of the condemnation proceeding. We take this position to show that even on their factual predicate, Appellants' challenge to the district court's dismissal of their Rule 60(b) motion falls short.

[7] See Supra, at 3.

[8] Appellants state in their brief that this case presents an issue of first impression of whether a person claiming an interest in condemned land who received no notice of eminent domain action may maintain a Rule 60(b) motion attacking the final judgment in the proceeding. Appellants' Brief at 32. We disagree with Appellants' characterization of the question presented since Fifth Circuit precedent controls the outcome of this dispute.

to the Langille Trust remaindermen does not foreclose Appellants' claims to the subject parcels as successors in interest to the remaindermen's interest in the land.[9] United States v. 22.680 Acres, 438 F.2d. 75, 77 (5th Cir. 1971). However, the lack of notice to the remaindermen does preclude Appellants' use of Rule 60(b) as the vehicle with which to advance their claims of ownership in the property. Screven v. United States, 207 F.2d. at 741; See United States v. 22.680 Acres, 438 F.2d. at 77-78.

Though the district court ruled that the Quiet Title Act "is the exclusive means by which adverse claimants may challenge the United States' title to real property", all we need to say is that in this particular case, Appellants can not use Rule 60(b) to press their claims against the United States with respect to their alleged ownership interest in the property in question and we say no more.

The judgment of the district court is AFFIRMED.

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[9] We do not decide the interest the remaindermen to the Langille Trust have in the property. It is important to remember what this appeal is not, viz. an adjudication of Appellants' rights to the subject parcels vis-a-vis the United States. We are only deciding if Appellants may use Rule 60(b) as a means to vindicate their alleged interest in the land.

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APPENDIX B

Memorandum and Order of the United States District Court for the Southern District of Texas, Laredo Division, entered December 9, 1996
Vol. 2, Docket 42

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA COUNTY, STATE OF TEXAS, FLUMENCIO MUNOZ, et al,	)	CIVIL ACTION NO. 529
	)	
Defendants.	)	

MEMORANDUM AND ORDER

Pending before the Court is *First Amended Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure* (Docket No. 7), filed October 10, 1995. The movants claim to be successors-in-interest to a 1/16th mineral interest in certain parcels of real property located in Zapata County, Texas. Under authority granted in 22 U.S.C. §277b and c, the United States condemned the Zapata County parcels in order to build the Falcon Dam and Reservoir. Following the filing of a petition in condemnation in December 1949, the United States filed

Declaration of Taking No. 1 in January 1950, and paid $252,800 into the registry of the Court, whereupon this Court entered *Judgment on Declaration of Taking No. 1* in January 1950. That judgment adjudged title to the entire mineral estate in the condemned lands to be in the United States, pursuant to 40 U.S.C. §258a.

In several judgments between 1955 and 1958, this Court revested in most of the former owners their former mineral rights in the condemned land pursuant to revestiture stipulations, but no such stipulation was entered with respect to the disputed l/16th mineral interest. Title to the 1/16th mineral interest therefore remained in the United States. This Court entered *Judgment Confirming Award of Special Commission and Report of Special Master* in July 1956, which compensated various parties for their condemned interests, but not movants' predecessor-in-interest to the disputed l/16th mineral interest. The movants argue that their predecessor-in-interest at the time of the condemnation was not properly served with notice of several amended petitions in condemnation which offered former landowners the right to elect to retain the oil and gas rights in the condemned land. Those that did so elect entered into

the revestiture stipulations with the United States. The movants argue that the lack of notice, in violation of Fed. R. Civ. P. 71A, and the lack of opportunity to enter into revestiture stipulations, renders void the judgment of this Court vesting the 1/16th mineral interest in the United States.

The United States has filed *United States' Motion to Dismiss Claims of Bank One Texas, N.A., Trustee, et al. for Lack of Subject Matter Jurisdiction* (Docket No. 18), filed March 26, 1996. The government seeks to have the Court dismiss the Rule 60(b) motion on the grounds that the exclusive remedy for challenging the United States' title to land is the Quiet Title Act, 28 U.S.C. §2409a.

Section 2409a, with certain exceptions not relevant to this action,[1] permits the United States to be "named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest . . ." 28 U.S.C. §2409a(a). The pending Rule 60(b) motion is an effort to obtain an

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[1] "... This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title ... 26 U.S.C. 7424, 7425 and 7426 ... or ... 43 U.S.C. 666." 38 U.S.C. §2409a(a).

adjudication that the movants have an existing property right in real property which the United States purportedly condemned to build a dam and reservoir and is being used as such. Certainly this action falls within the terms of §2409a.

The pending Rule 60(b) motion must be dismissed because the QTA is the exclusive means by which adverse claimants may challenge the United States' title to real property. Block v North Dakota ex rel. Bd. of Univ. and Sch. Lands, 103 S.Ct. 1811, 1819 (1983). In Block, the United States and North Dakota both claimed title to certain portions of the bed of the Little Missouri River. The Eighth Circuit affirmed the district court's ruling that the QTA's twelve-year statute of limitations did not apply to a state as sovereign unless contrary intent is clearly evident from the express language of the statute. On appeal, North Dakota argued that even if the QTA statute of limitations did apply to a sovereign state, the suit was still maintainable separate from the QTA as an action against federal officers. The Supreme Court rejected that argument, finding that the legislative history of the QTA indicates that Congress intended to foreclose all other means of challenging United States' title to real property, save certain exceptions not

relevant to this action. Any other interpretation of the QTA, the Supreme Court noted, would allow claimants to "avert[] . . . all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest." Id. at 1818. The Court also found applicable the rule that "a precisely drawn, detailed statute pre-empts more general remedies." Id. at 1819, citing Brown v GSA, 96 S.Ct. 1961, 1968 (1976).

Three years later, the Supreme Court reaffirmed the exclusivity of the QTA in United States v Mottaz, 106 S.Ct. 2224 (1986). The claimant in Mottaz had inherited interests in Indian land allotments held in trust by the United States but later sold by the Government to the United States Forest Service in 1954. After learning of the sale in 1981, the claimant sought to void the sale of land under, *inter alia,* the General Allotment Act of 1887.[2] The Supreme Court held that while §345 of the General Allotment Act expressly authorizes suits against the United States for the issuance of an allotment, it does not authorize suits against the United States to enforce an Indian's interests and rights in his allotment after he

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[2] 24 Stat. 388, as amended, 25 U.S.C. §331 *et seq.*

has acquired it. The United States has waived sovereign immunity in such cases *only* pursuant to the Quiet Title Act. The Court reiterated the concern expressed in Block that permitting suits against the United States under the General Allotment Act would allow plaintiffs to avoid the QTA statute of limitations and disrupt ongoing federal programs.

Neither Block nor Mottaz concerned a claimant challenging, through Rule 60(b), United States' title to land taken in a condemnation proceeding. Nevertheless, the Court finds no reason why the exclusivity of the QTA would not apply to disputes over title to land condemned by the United States. The Fourth Circuit took this approach in Klugh v United States, 818 F.2d 294 (1987). The Klugh decision, on a set of facts nearly identical to those here, observed that "[t]he Congressional concern that the 'carefully crafted provisions of the QTA' not be averted by artful pleading is too strong to permit any other conclusion." 818 F.2d at 299.

The movants' opposition to the motion to dismiss is twofold. First, movants assert that the right of election offered to movants' predecessor-in-interest in the amended petitions in

condemnation was never withdrawn, nor dismissed by the Court, nor made the subject of a final judgment, and that therefore the movants may elect now to retain the mineral rights in the condemned land. Contrary to the movants' assertion, however, this Court entered three orders on August 10, 1970, closing this case: *Order Transmitting Funds to the Treasurer of the United States, Order Refunding Deposits*, and *Order Closing Civil Action*. The last order, which applied to "ALL PARCELS/ALL DECLARATIONS OF TAKING," declared that "all matters and controversies have been adjudicated in the above captioned civil matter . . ." Thus the right of election movants claim to exercise was terminated no later than August 10, 1970.

Second, movants urge that Rule 60(b) is the appropriate vehicle to assert their rights to the 1/16th mineral interest. Movants' reliance on Southern Distributing Co. v Technical Support Associates, Inc., 105 FRD 1 (S.D.Tex 1984), and Rockwell International Corp. v KND Corp., 83 FRD 556 (N.D.Tex. 1979) is misplaced. While both cases favor the use of a Rule 60(b) motion to set aside a judgment, neither involve a challenge to United States' title to land.

The limited use of Rule 60(b) permitted in Kirby Forest Industries, Inc. v United States, 104 S.Ct. 2187 (1984), is equally unavailing to the movants. Kirby allowed a Rule 60(b) motion to reopen a condemnation proceeding only to challenge the amount of the compensation on the grounds that the value of the condemned land changed between the date of the adjudication of the award and the date of payment. The Supreme Court stressed that the reopened issue in that case would be "very limited." Id. at 2198. The parties were not to be allowed even to question the adjudicated value of the tract at the time of its original valuation. Clearly Kirby does not contemplate a Rule 60(b) challenge to the fundamental issue of title. Any challenges to the United States' title to the 1/16th mineral interest in the condemned Zapata County parcels must be brought under the Quiet Title Act.

Accordingly, *United States' Motion to Dismiss Claims of Bank One Texas, N.A., Trustee, et al. for Lack of Subject Matter Jurisdiction* (Docket No. 18) is GRANTED.

DONE at Laredo, Texas, this <7th> day of December, 1996.

<Signed>
UNITED STATES DISTRICT JUDGE

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APPENDIX C

Order of the United States District Court
for the Southern District of Texas,
Laredo Division, entered December 9, 1996
Vol. 2, Docket 43

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

UNITED STATES OF AMERICA Plaintiff, VS. 85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA COUNTY, STATE OF TEXAS, FLUMENCIO MUNOZ, et. al, Defendants.	*	CIVIL ACTION NO. 529

ORDER

First Amended Motion Pursuant to Rule 60(b)(4) and (6) of the Federal Rules of Civil Procedure (Docket No. 7), filed October 10, 1995, is DENIED.

Accordingly, the following motions are DENIED as moot:

(1) *Motion for Summary Judgment of Bank One, Texas National Association, Trustee of the Red Crest Trust, et al.* [sic] *and*

Brief in Support (Docket No. 16), filed March 1, 1996.

(2) *United States' Motion to Strike Motion for Summary Judgment of Bank One Texas, N.A.* (Docket No. 17), filed March 25, 1996.

(3) *United States' Motion to Stike Bank One's First Supplement to Their Answer and Election* (Docket No. 24), filed April 17, 1996.

(4) *Motion for Leave to File Reply to the United States' Consolidated Response to Claims of Bank One, Texas, N.A., Trustee, et al.* (Docket No. 30), filed June 14, 1996.

DONE at Laredo, Texas, this <7th> day of December, 1996.

<SIGNED BY GEORGE KAZEN>
UNITED STATES DISTRICT JUDGE

APPENDIX D

Memorandum and Order of the United States District Court for the Southern District of Texas, Laredo Division, entered January 30, 1997, Vol. 1, Docket 55

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

LAREDO DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. 85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA COUNTY, STATE OF TEXAS, FLUMENCIO MUNOZ, ET AL., Defendants.	*	CIVIL ACTION NO. 529

MEMORANDUM AND ORDER

Pending is a motion by Bank One, Texas, N.A., et al ("Movants"), asking this Court under Rule 59(e), Fed. R. Civ. P., to alter or amend its order of December 7, 1996 (Docket No. 45).

Movants first protest that they are not "successors in interest" to the disputed mineral interest because three of the movants were alive at the time their remainder interest was created in 1938, and, therefore, their remainder interest had vested directly in them. They then assert that none of the three was named as a party to the condemnation in December 1949 nor was served or

appeared. From that premise they assert that they are now entitled to invoke Rule 60(b), Fed. R. Crim. P., to set aside a "default judgment." This reasoning is flawed. If a person is never named in a suit, is never served, and does not appear, then he cannot be in default. He has simply never been a party. If that be true, a judgment that affects his rights may well be subject to attack, but that circumstance has no bearing on this Court's previous decision that the proper vehicle for such an attack in this case is a suit under the Quiet Title Act.

Movants argue next that the *Judgment on Declaration of Taking No. 1* did not adjudge title to the land containing the now-disputed 1/16th mineral interest to be in the United States because that judgment held this action open "for such other . . . orders, judgments and decrees as may be necessary. . ." and because the United States holds only defeasible title to condemned lands after filing a Declaration of Taking until a court enters final judgment. Under 40 U.S.C. §258a, once the United States has filed the appropriate "declaration of taking" and deposited a sum of money representing "just compensation" for the land taken (which

have occurred in this case), "title to the said lands in fee simple absolute . . . shall vest in the United States of America . . . " The judgment is held "open" to ascertain and award just compensation.

Movants' reliance on the "defeasible title" language in Catlin v United States, 65 S.Ct. 631 (1945), is misplaced. There, the Supreme Court was concerned with the landowner's right to challenge the validity of a taking "for nonconformity with the prescribed statutory purposes," id. at 638, which is not an issue here. Moreover, Catlin was concerned with whether an initial, ex parte "judgment," rendered right after the declaration of taking and before the landowner could challenge the purpose of the taking, was "final" for appellate purposes. In the instant case, as reflected in the December 7 order and in this memo, the final judgment was entered long after the initial declaration of taking.

Movants next maintain that neither the Fort Worth National Bank nor the McMullen Oil & Royalty Co., Inc. had notice of the "stipulation of right of election," that this right was never withdrawn, and that no judgment in Civil Action No. 529 ever addressed this right. Accordingly, alluding to Rule 54(b), Fed. R.

Civ. P., movants conclude that no final judgment has been entered in this case. Of course, were that true, a Rule 60 motion would not lie since it "does not afford relief from interim or interlocutory judgments." Wilson v. Johns-Manville Sales Corp., 873 F.2d 869, 871 (5th Cir. 1989). The Court disagrees, however, with movants' premise.

The *Judgment Confirming Award* did resolve all claims. That judgment adopted the findings in the *Report of Special Master*, filed July 6, 1956, which findings were "relative to the title to the land in the above proceeding and relative to the division or apportionment of the sum or sums awarded as just compensation." *Report of Special Master*, at 1. The special master's report clearly purported to make findings relative to all title claims involved in this case, including those movant has placed at issue. His findings include:

> . . . all proper persons were duly impleaded as parties defendants in this action in the Third Amended Petition in Condemnation and in the subsequent amendments to said Petition, either specifically by name, where known, or under the designation of unknown owners, where unknown, as provided in Rule 71A of the Federal Rules of Civil Procedure. I further find that all defendants were duly

> served with notice either in person or by publication, and if by publication, a diligent effort was made to ascertain the whereabouts of the parties so served.

Report of Special Master, at 3. Subject to several timely objections not relevant here, the *Judgment Confirming Award* states:

> It appearing to the Court that both reports should be, and the same hereby are, approved and confirmed in all other respects, except it is specifically provided that this judgment is not to be construed as an adjudication of the nature and extent of the minerals held by M. J. Raymond under the deeds aforesaid, but it is only an adjudication of the extent to which said owners shall share in the awards of just compensation . . .

Judgment Confirming Award, at 14A. Additionally, the *Order Closing Civil Action*, filed August 10, 1970, applied to "ALL PARCELS/ALL DECLARATIONS OF TAKING" and declared that "all matters and controversies have been adjudicated in the above captioned civil matter . . ."

By its very terms, Rule 54(b) describes a non-final judgment as one that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties. Correctly or incorrectly, the 1970 order closed this case and declared all controversies to have been adjudicated. That language is tantamount to a decree that

any other relief sought by anyone is denied, which would include any "stipulation of right of revestment."

The motion to alter or amend the order of December 7, 1996 (Docket No. 45), is DENIED. The motion for permission to file additional authorities in support of the foregoing motion (Docket No. 53) is also DENIED.

In a separate filing (Docket No. 44), movants again invoke Rule 59(e) to protest the Court's denial of their own previous motion for summary judgment. This motion is based on the erroneous proposition that a Rule 60 motion always requires an evidentiary hearing. Movants rely on Scola v. Boat Frances R., Inc., 618 F.2d 147, 152 (1st Cir. 1980), where the court merely observed -- in dicta -- that notice and an opportunity to be heard would usually be required for a Rule 60(b) motion to vacate and re-enter judgments for the purpose of reviving a lost right of appeal, because the court must weigh certain factors, including the explanation for the delay. The motion under consideration is not of that type.

Movants incorrectly suggest that Fifth Circuit law also supports a right to a hearing, citing Laguna Royalty Co. v Marsh,

350 F.2d 817 (5th Cir. 1965). The Rule 60(b) motion in Laguna Royalty involved a significant factual dispute, and the Fifth Circuit concluded that the district court could not properly resolve that dispute without a hearing. The Fifth Circuit has never held that a hearing on a Rule 60(b) motion is always required or even favored. On the contrary, in Wilson, supra 873 F.2d at 872, the Fifth Circuit applied to Rule 60(b) motions the rule that a "decision to hear oral testimony on motions is within the sound discretion of the court," *citing* Garv W. v Louisiana, 601 F.2d 240, 244 (5th Cir. 1979). In the instant case, there is no complex factual dispute relevant to the issue presented to the Court that has not already been adequately addressed by movants' filings.

Additionally, movants' motion for a new trial in Docket No. 44 is untimely as there has been no trial. Accordingly, the second Rule 59 motion (Docket No. 44) is also DENIED.

Accordingly, movants' request for permission to file another supplement to their "Answer and Election" (Docket No. 52) is DENIED as moot.

DONE at Laredo, Texas, this <30th> day of January, 1997.

<SIGNED BY GEORGE KAZEN>
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX E

Order Denying Petition for Rehearing of the
United States Court of Appeals for the
Fifth Circuit, filed November 3, 1997
Fifth Circuit Order

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-40149

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

85,237 ACRES OF LAND, MORE OR LESS, ET AL

Defendants,

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR; ANDY J MCMULLEN

Defendants - Appellants

Appeal from the United States District Court for the Southern District of Texas, Laredo

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ON PETITION FOR REHEARING

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is <DENIED>.

ENTERED FOR THE COURT:

<SIGNED>
United States Circuit Judge

REHG - 2

APPENDIX F

Order Closing Civil Action filed August 10, 1970
in the United States District Court for the
Southern District of Texas, Laredo Division
Vol. 4, Docket 15, Page 344

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA,	X	
	X	CIVIL ACTION
	X	NO. 529
v.	X	
	X	
85,237 ACRES OF LAND,	X	ALL PARCELS
MORE OR LESS, IN	X	ALL DECLARATIONS
ZAPATA COUNTY,	X	OF TAKING
STATE OF TEXAS,	X	
FLUMENCIO	X	
MUNOZ ET AL.,	X	

ORDER CLOSING CIVIL ACTION

It appearing to the Court that all matters and controversies have been adjudicated in the above captioned civil matter, that the deposits and disbursements of the just compensation which have been awarded have been made insofar as it is possible to do so, that the surplus funds have been returned to the United States Section of the International Boundary & Water Commission, and that all unclaimed funds have been transmitted to the Treasurer of the United States, it is accordingly ORDERED that the above captioned civil action be and is hereby CLOSED and DROPPED from the Docket of this Court; subject, however, to the power of the Court to make such future Orders, if any, as may be necessary.

DONE at <LAREDO>, Texas, this <10th> day of August, 1970.

<SIGNED>
BEN C. CONNALLY
United States District Judge

APPROVED:

ANTHONY J. P. FARRIS
United States Attorney

By: <SIGNED>
WILLIAM L. BOWERS, JR.
Assistant United States Attorney

APPENDIX G

Will of Susie McMullen Langille
Vol. 3, Docket 22, Page 502

STATE OF TEXAS)
COUNTY OF TARRANT)

I, SUSIE MCMULLEN LANGILLE, a resident and citizen of Fort Worth, Tarrant County, Texas, being of sound and disposing mind and memory, do make, publish and declare this to be my LAST WILL and TESTAMENT, hereby cancelling, annulling and revoking all other and former will, and each and every codicil thereto by me heretofore made.

ITEM I.

(a) Following my death, I direct that my funeral be conducted by my good friend, FRED P. MUELLER, of Fort Worth, Texas, if living; otherwise by the firm with which he was associated at the time of his death, and that so far as possible, it be of the same character as that of my late husband, H. J. McMullen. I direct that my Executor, hereinafter named, or its successor or substitute, shall pay for my funeral expenses out of the funds realized from the sale of my Russian sables, and all of the diamonds, including the rings, pins, bars, and other articles on which they are mounted, I may own at the time of my death; and the right to make such sale, for all cash,

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

or all credit, or part cash and part credit, is hereby expressly granted to my said Executor.

(b) I direct my said Executor to first pay, out of such cash funds as may be on hand at the time of my death, or from cash realized by my said Executor, from the sale of any of my stocks, bonds, notes, securities, or other property, and the right to make such sale is hereby expressly granted to my said Executor, except that I provide the property devised and bequeathed in Item II hereof, shall be the last resorted to, all of my just and legal debts, including those incident to my last illness, and all estate, transfer, and inheritance taxes which may be levied or assessed upon or against my estate, and against the share or interest therein of any beneficiary.

ITEM II.

I give, devise and bequeath -

(a) To my beloved husband, George Langille:

(1) Such automobiles as may be owned by me, individually, and used personally by me, or by my husband, or by both of us, being at present a Cadillac sedan and a Dodge

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

Coupe; and;

(2) My Gar-Wood motorboat, located on the waters of Lake Worth, Tarrant County, Texas; and,

(3) My home on the shores of Lake Worth, Fort Worth, Tarrant County, Texas, known as "Red Crest", complete with all of the furniture, furnishings, lamps, rugs, fixtures, dishes, silverware, linens, bedding, drapes, pictures, implements, and any and all other objects, pieces, and personal property which are contained in, or used in connection with my said home, at the time of my death, except a mounted Tarpon, and a picture over the fireplace, which belong to my son, John H. McMullen.

In connection with the bequest of my home, "Red Crest", so long as it shall be owned and actually occupied by my husband, I hereby direct that the Trustee, hereinafter designated, shall pay, when due, out of the gross income from the Trust Estate hereinafter created, or such portion thereof as remains in its control, as hereinafter provided for, the following:

A. All premiums for insurance policies on "Red Crest" and the furniture and fixtures contained therein, not to exceed in the aggregate, however, Twelve Thousand Five Hundred Dollars ($12,500.00); and,

B. The annual rental due to the City of Fort Worth, or any subdivision thereof, for the property upon which "Red Crest" is located, and the grounds in connection therewith; and,

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

C. Any other taxes, assessments and charges which may be assessed by or due to any lawfully constituted, governing body, whether now or hereafter created.

(b) To my beloved, and long-cherished friend, MRS. MAMIE ADAMS TERRY, of Fort Worth, Tarrant County, Texas, my white Ermine evening wrap;

(c) To my long-time employee, JOHN MONCRIEF, the sum of FIVE HUNDRED DOLLARS ($500.00);

(d) To my devoted servant, ERNEST RAMSEY:

Lot 20, Block 1, Mansfield Road Addition to the City of Fort Worth, Tarrant County, Texas, together with all improvements thereon.

(e) To my children, JOHN H. McMULLEN of Fort Worth, Texas, and MRS. PAUL BOWDEN of San Antonio Texas, to be divided as they may agree upon between themselves, all of the personal effects, clothes, jewelry, furniture, and fixtures which are not otherwise expressly disposed of by the provisions of this will.

ITEM III.

In event both of my children predecease me, then I hereby give, devise and bequeath all of the rest, residue and remainder of my property, real, personal and mixed, of which I may die seized

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

and possessed, to those persons entitled thereto, in accordance with the laws of descent and distribution, in the State of Texas, at the time of my death; in event, however, my two children, or either of them, survive me, I give, devise, and bequeath all of the rest, residue and remainder of my property, real, personal, and mixed, of which I may die seized and possessed, or to which I may in any way be entitled, of whatsoever the same may consist, and wherever situated, to THE FORT WORTH NATIONAL BANK, of Fort Worth, Texas, or its successor or substitute, as Trustee, in Trust, nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set out:

(1) I hereby direct and authorize my Trustee to receive, hold, manage, operate and control the Trust Estate hereby created.

A. My Trustee is expressly authorized and empowered, in its exclusive discretion as Trustee, to retain any notes (whether secured or otherwise), stocks, bonds, securities, or other evidences of indebtedness in the same form in which they may be at the time of my death, without liability for loss or depreciation in

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<SIGNED BY SUSIE McMULLEN LANGILLE>

the value of such securities, for so doing, or my Trustee may sell the same, or any part thereof, for all cash, or all credit, or for part cash and part credit, with or without security, as my Trustee, in its exclusive discretion, may determine, and invest and reinvest the proceeds in such stocks, bonds, securities, notes (Vendor's lien or secured by Deed Of Trust) or other character of investments, real or personal, or both, secured or unsecured, as my Trustee shall, in its exclusive discretion, deem suitable; and the Trustee's Judgment in all such matters shall be final, conclusive and binding upon all beneficiaries of this Trust Estate.

B. I direct and authorize that my Trustee shall have and possess the following powers and authorities, in addition to those elsewhere in this Will granted:

1. To execute, acknowledge and deliver any and all necessary contracts of sale, deeds (with or without warranty), oil, gas and mineral conveyances, royalty deeds(with or without warranty), leases (and assignments thereof), covering or with respect to any land and real estate, or any interest therein, which may become a part of the principal of the Trust Estate hereby created. The Trustee is fully authorized to sell outright, in fee simple (with or without warranty), any oil, gas and mineral estate owned by the principal of the Trust Estate; or said

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<SIGNED BY SUSIE McMULLEN LANGILLE>

Trustee may execute and deliver oil, gas and mineral leases, conveyances and royalty deeds (with or without warranty), covering real property, constituting a part of the principal of the Trust Fund, for a term either within or extending beyond the duration of the Trust.

2. To lease or rent any buildings, improvements, or real estate which may constitute a part of the principal of the Trust Fund, for such term as the Trustee, in its exclusive discretion, may deem advisable, even though the same may exist and extend beyond the term of the Trust; and further, to extend and renew any notes, secured or unsecured, which may be a part of the principal of the Trust Estate, for such respective terms, and upon such condition, as the Trustee, in its exclusive discretion, may approve, for a term either within or extending beyond the duration of the Trust.

3. To make advances out of the principal of the Trust Estate, to borrow money and to pledge as security, for the payment thereof, such part or portion of the assets of the principal of the Trust Estate as the Trustee may, in its exclusive discretion, approve, for the protection of any property which may be a part of the principal of the Trust Estate, resulting from sudden or pending foreclosure of mortgages, deeds of trust, pledges, or otherwise, or to protect the principal of

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

the Trust Estate from any tax, assessments, or other charge, ordinary or extraordinary, which may be levied against the same; and in making payment of any moneys advanced or expended by the Trustee, either directly or to repay loans procured for the account of the principal of the Trust Estate, said Trustee is fully authorized to see so much of the property belonging to the principal of the Trust Fund, as shall be necessary, in the Trustee's exclusive judgment, to provide funds with which to make said payment.

4. To file suit in any court having jurisdiction of the Trust Estate, asking for the advice and judgment of the Court in the matter of the construction of this Trust Fund, or any provision hereof, or of the exercise of any right, power, or authority hereunder, and notice of such suit may be given to the living beneficiaries by such character of notice as the Court may require, and any unborn contingent beneficiary shall be deemed to be represented by the beneficiary or beneficiaries then living, and fully bound by any judgment entered in such suit, to the same extent as if then in being.

5. To make demands, sue, and receipt for all amounts due and owing to, and claims and causes of action owned by or involving this Trust; and, to defend all claims and causes of action asserted against the Trust property, or this Trust,

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

or the interest of any beneficiary herein, and to settle and compromise for, and in behalf of this Trust, and all beneficiaries of same, all claims, demands, and causes of action, involving either the Trust property or the right, title or interest of any beneficiary therein, now in being or unborn; all of which said settlement and compromise as so made by said Trustee, shall be made by the Trustee acting upon its sole and exclusive discretion and judgment, and when made, shall be binding upon all of the Trust Estate, whether in being or unborn.

6. To vote in person or by proxy upon all stocks or other securities held by my Trustee; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation; to enter into any agreement in respect to the redemption of any stock of any corporation; to consent to the reorganization, consolidation, or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation, and upon such reorganization, consolidation, merger, sale or lease, to exchange the securities held by my Trustee for the securities issued in connection; therewith; to pay all assessments, subscriptions, and other sums of money as may be required for the protection of the interest of the Trust Estate as holder of any stocks, bonds, or other securities of any corporation; to

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

exercise any option contained in any stocks, bonds, or other securities, for the conversion thereof into other securities, or take advantage of any right to subscribe for additional stocks, bonds, or other securities, and to make any and all necessary payments therefor; to execute release of mortgages, pledges and liens of all character, and generally to exercise in respect of all stocks, bonds, securities, notes, or other investments held by the Trustee, whenever acquired, all such rights, powers and privileges as may be lawfully exercised by any person owning similar property in his own right; provided, however, that the Trustee shall not make any of the payments herein permitted, except from the principal of the Trust Estate.

7. To employ, at the expense of my estate, all necessary attorneys, accountants, tax consultants, bookkeepers, and clerical help.

I further direct and authorize my trustee to continue to operate and conduct any business or businesses in which I may be engaged at the time of my death, or to liquidate all or part of them, at its sole and exclusive discretion, and if operated, the profits thereof shall be considered as income.

C. I further direct and authorize my Trustee to pay all operating and maintenance expenses,

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

taxes and insurance; and in the event the revenues therefrom are insufficient to meet the operating expenses, taxes and insurance, I expressly authorize and empower my said Trustee to borrow, from time to time, so long as the Trust shall continue, such amount of money, as in the Trustee's judgment is required to meet and pay deficiencies and operating expenses, insurance and taxes, and to secure any and all such loans, to execute and deliver from time to time such mortgages and deeds of trust, with or without powers of sale, as my Trustee considers should be given upon any part, or all of my said Trust Estate, such mortgages and deeds of trust to contain such terms, conditions and powers of sale as my said Trustee may approve; and in all such matters the Judgment and discretion of my said Trustee shall be binding and conclusive upon all beneficiaries of the Trust so established by me, and I expressly stipulate and provide that the ultimate or contingent interest of the beneficiaries herein named, and the heirs of their bodies shall be subordinate to the power and authority herein given to my Trustee to borrow and to execute mortgages and deeds of trust, from time to time, upon the Trust Estate, or such portion as remains in its hand, and to pay deficiencies and operating expense, taxes and insurance, so long as the Trust, or any portion thereof herein established, shall continue.

D. I further authorize and direct that my Trustee shall have full power and authority to sell, at public or private sale, for cash or for credit, or

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

for both, any and all portions of the principal of the Trust Estate hereby created, or any part thereof remaining under its control, when and so often as it deems to the best interest of the Trust Estate, in accordance with its sole and exclusive judgment and discretion, and to make, execute and deliver all necessary deeds (with or without warranty), bills of sale, conveyances, contracts, or other instruments; and to invest, and reinvest, from time to time, the proceeds thereof in such other property, either real estate or notes secured by Vendors lien or by Deed of Trust, stocks, bonds or other securities, which it, in the exercise of its sole and exclusive discretion, may select, with full power to sell, exchange, and substitute, to the same extent generally as such rights, powers and privileges may be lawfully exercised by any person owning similar property in his own right. In making this provision, I expressly provide that, except for fraud, or gross negligence, my Trustee shall in no way, nor to any extent, be liable or responsible to the ultimate beneficiaries of the Trust Estate, for any losses resulting from investment or reinvestment during the period of this Trust, and I hereby ratify, approve and confirm all acts done and performed by my Trustee.

E. In addition to the powers and authorities herein expressly given to my Trustee, I hereby expressly authorize and empower it to conduct and carry on the Trust Estate and transact any and all affairs and business incident thereto, fully clothing the Trustee with full and

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

unrestricted power and authority to act as fully as if I, myself, were acting, so that no question can ever be raised as to the power and authority of my Trustee.

F. I further direct and authorize my Trustee, after deducting from the gross income of the Trust Estate all costs of operation, and maintenance, both as to the Trust Estate and as to the property comprising it, all reasonable fees of the Trustee, attorneys, accountants, tax consultants, bookkeepers, clerical help, and others reasonably necessary in the handling and management of my estate, improvements, modernization, repairs and replacement, the charges provided for in connection with my home "Red Crest" in Item II hereof, all taxes, assessments, and such other charges as my Trustee shall, in its sole and exclusive discretion deem necessary or proper, to apportion and pay over the net income, semi-annually or oftener, if in the sole and exclusive discretion of my Trustee, it deems desirable, as follows:

To my son, JOHN H. McMULLEN, one-half;
To my daughter, MRS. PAUL BOWDEN, one-half;

G. It is my further wish and direction, that as each of my children shall attain the age of forty years, to such child or children there shall be paid each year thereafter, for ten years, so far as is practicable in the handling of this estate, out of the principal of the Trust property, a sum equivalent to three and one-

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

third per cent of the principal of the Estate so that at the expiration of ten years from the time when such child or children shall attain the age of forty years, he or she shall have received one-third of the principal of the Trust Estate herein created. As each payment is made from the principal of the Trust Estate, the income from the balance of the principal, as to such child receiving it, will thereby be reduced in such proportion as such child or children shall have been paid his or her share of the principal. From and after the date both of my children shall reach the age of fifty years, each shall continue to receive, as long as each shall live, one-half of the net income from the balance of the Trust Estate herein created.

H. If either of my two children shall predecease me, or at the death of either of my children, after my death, the interest of such deceased child in the Trust Estate herein created, both as to net income and as to principal, shall go to and be for the use and benefit of the survivor.

I. At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

J. At the termination of the Trust Estate, the Trustee is authorized and directed to make

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

division and distribution of the principal of the Trust Fund in kind, or partly in kind and partly in money, or all in money, at the absolute discretion of the Trustee; and preliminary to, and to accomplish such division and distribution, said Trustee shall be fully authorized and empowered to sell and reduce to cash or its equivalent, any part or all of the properties, or assets on hand, constituting the principal fund, at such prices, and under such terms and conditions a as to said Trustee should seem advisable, and to the best interest of the Trust Estate.

K. If at the death of the survivor of my children, there be no heirs of the body of my children, then the principal of the Trust Estate remaining within the control of the Trustee shall be disposed of as hereinabove provided, in accordance with the laws of descent and distribution in effect in Texas at the time of my death.

L. Notwithstanding the other provisions regarding the estate herein created, I hereby expressly authorize and direct the Trustee, in its sole discretion, to use the principal of this estate, not to exceed one-half (½) thereof, however, for the use and benefit of either of my children, in the event either or both of them need an additional sum over and above the net income thereof, by virtue of illness, injury or physical disability, it being my express intention that the Trustee shall be authorized to use such portion of the Trust Estate herein created, in the payment of

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

medical expenses, physicians', surgeons' or nurses' fees, hospital costs, and any other expense which, in the judgment of the Trustee, it deems necessary or useful for the comfort and treatment of such child. Any such advances made to such child, shall be charged to such child's portion of the income, or future interests in the principal of the Trust Estate.

ITEM IV.

I further direct and declare that each and every gift, legacy or provision of this my Will, whereby any money or property is given to or for the benefit of any person or persons is subject to the following express condition; that is to say, that the person or persons to whom, or in case of trust, for whose benefit such money or property is given, shall not in any manner contest or oppose the probate of this my Will, or assert in any manner, direct or indirect, before any judicial tribunal that the same is not my last Will and Testament, or deny or call in question before any judicial tribunal the legal validity of any of the dispositions or provisions therein contained, and in case any person or persons, to whom, or in case of trusts, for whose benefit, any such money or property is by this Will

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

given, shall in any manner contest or oppose the probate thereof, or assert in any manner, directly or indirectly, before any judicial tribunal, that the same is not my last Will and Testament, or deny or call in question before any judicial tribunal, the legal validity of any of the dispositions therein contained, then in such case, and in every such case, the money or property which is by any provision of this Will destined to or for the benefit of such person, or persons, and any estate, share or interest in any property, real or personal, left by me at my death, shall thereupon go to my husband, GEORGE LANGILLE, if then alive, and to accomplish this, the proportionate part of the Trust Estate herein created, for the use and benefit of such person or persons, shall be, by the Trustee, liquidated, at the earliest time practicable, without undue sacrifice, and the proceeds thereof paid to my husband, GEORGE LANGILLE, and to be owned by him in fee simple.

ITEM V.

I hereby nominate and appoint the FORT WORTH NATIONAL BANK, of Fort Worth, Texas, Executor of this my last

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

Will and Testament, and Trustee for the purposes therein stated, and direct that no bond be required of it, and that no action be had in the Probate Court under this will, other than filing an inventory and appraisement and list of claims, as required by law. Should the Fort Worth National Bank fail, refuse, or be unable to act as Trustee of the Trust Estate herein created, or, having accepted such Trust, decline further to serve, then I direct and authorize the Judge of the United States District Court, sitting at Forth Worth, to appoint and nominate a successor Trustee, with all the powers and authorities and discretion given to the said Fort Worth National Bank, and I request that such selection be a corporate trust company, including a national bank, doing business in Fort Worth, Tarrant County, Texas, if possible. In like manner, I direct that such successor Trustees be designated if the occasion requires.

IN WITNESS WHEREOF, I have hereunto set my hand, at Fort Worth, Texas, in the presence of <SIGNED> and <SIGNED>, attesting witnesses, this the <20th> day of October, A.D. 1938.

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

<SIGNED>
Testator

Signed, Declared and Published by SUSIE McMULLEN LANGILLE, as her LAST WILL AND TESTAMENT, in the presence of us and each of us, the undersigned, who, at her request and in her presence, and in the presence of each other, hereunto subscribe our names as attesting witnesses, this the <20th> day of October, A.D. 1938.

<SIGNED>

<SIGNED>
Witnesses.

IDENTIFIED:
<SIGNED BY SUSIE McMULLEN LANGILLE>

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APPENDIX H

Codicil to Will of Susie McMullen Langille
Vol. 3, Docket 22, Page 496

I, SUSIE McMULLEN LANGILLE, being of sound and disposing mind and memory, do hereby make and publish this the first Codicil to my Will, duly executed by me on October 20, 1938, consisting of twelve (12) pages and to which original Will this Codicil is attached.

1. In connection with Paragraphs A, B and C, subsection (3), Section (a) or Item II, providing for the payment Of certain insurance premiums, rentals, taxes, assessments, etc., it was my intention at the time of the execution of my Will, and now is my intention, that such charges shall be made by my Trustee, for a period of time not exceeding the term of the Trust Estate. Further, in connection with the said Paragraph A, relating to the payment of insurance premiums, it was my intention at the time of execution of the Will, and is now my intention, that the payments provided to be made by my Trustee shall be all of the insurance premiums on policies covering my house, "Red Crest" and furniture, which policies do not exceed the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) these payments likewise not to be made beyond the term of the Trust.

2. In connection with Paragraph A, Section (l) of Item III, authorizing my Trustee to retain certain personal property of mine, it was my intention at the time of the execution of my Will, and is now my intention, in addition to the complete powers granted to my Trustee in connection with the properties named therein, that

it should likewise have the same right and privileges with respect to any and all real property, it being my intention then, and now, to extend to my Trustee all the rights designated, not only with respect to personal property, but all property of which I may die seized and possessed, except as may be otherwise expressly designated in my said Will.

3. I further direct and provide that so long as the Trustee designated in my Will shall be vested with the ownership and possession of the principal and income of the Trust Estate, no beneficiary shall have or possess any power to dispose of, or in any way encumber or charge by way of anticipation or otherwise, the income or principal payable to any such beneficiary, or to dispose of, charge or encumber such beneficiary's share or interest in the Trust property, nor shall the trust property, or the net income derived therefrom, or the beneficial interest possessed therein by any of the named beneficiaries be liable or chargeable under writs of attachment, garnishment, execution or otherwise, in the hands of the Trustee for any debt or liability of such beneficiary, prior to the actual delivery thereof by the Trustee, and the actual receipt thereof by the beneficiary.

Except as my said Will Of October 20, 1938 is by this Codicil modified and changed, it is by me in all things ratified, confirmed and approved.

IN TESTIMONY WHEREOF, I, SUSIE McMULLEN

Identified:

<SIGNED by Susie McMullen Langille>

LANGILLE, have, to this my first Codicil to my Last Will and Testament, subscribed my name this the <3rd> day of November, A. D. 1938.

<SIGNED>

SIGNED, PUBLISHED and DECLARED by the above named Testatrix, as and for the first Codicil to her Last Will and Testament, in the presence of us, and each of us, who at her request, in her presence, and in the presence of each other, have subscribed our names hereunto as attesting witnesses the day and year last above written.

<SIGNED>
Witness

<SIGNED>
Witness

Identified:
<SIGNED by Susie McMullen Langille>

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APPENDIX I

Relevant Portions of *Amended Petition in Condemnation No. 3*
Vol. 4, Docket 15, Page 368

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA, Petitioner Vs. 85,237 ACRES OF LAND, MORE OR LESS, IN ZAPATA, COUNTY STATE OF TEXAS, FLUMENCIO MUNOZ, ETAL., Defendants.	*	CIVIL ACTION NO. 529 AMENDED PETITION IN CONDEMNATION NO. 3

TO THE HONORABLES, THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS:

1. This is an action of a civil nature brought by the United States of America at the request of the Secretary of State for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the following Acts of Congress and amendments thereto: Act of August 1, 1888 (40 U.S.C. Sec. 257), Act approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) and acts supplementary thereto and amendatory thereof, and under the further authority of the Act approved August 19, 1935

(22 U.S.C. 277 b&c) as amended, and the Treaty Between the United States of America and Mexico, concluded February 3, 1944, (Treaty Series 994) entitled "Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande" and Protocol and executive orders, and the American-Mexican Treaty Act of 1950 (22 U.S.C. 277 d-1, et seq.), and the Acts approved July 9, 1947, Public Law 166; June 3, 1948, Public Law 597; July 20, 1949, Public Law 179 and September 6, 1950 (64 Stat. 611), which acts appropriate funds which are available for such purposes.

3. The use for which the property is to be taken is as follows: the said lands are necessary adequately to provide for the utilization of the waters of the Rio Grande. Said lands have been selected for acquisition by the United States of America for use in connection with the establishment of the Falcon Dam and Reservoir - Rio Grande International Dams Project, and for such other uses as may be authorized by Congress or by Executive Order.

4. The interest in the property to be acquired is:

In Tracts A and A-2, as shown on Exhibit "D", the fee simple estate, (save and except oil and gas, but subject to the negative easement in and under lands described in Paragraph "5" in the original Petition in Condemnation) and the fee simple estate in the area shown as the Town of Zapata,

as shown on the replat of said town made by the International Boundary and Water Commission, filed for record with the County Clerk of Zapata County, Texas. In all of the other lands in Tracts A and A-2, the fee simple estate, provided, however, that the owners of the oil and gas in and under said tracts may, at their election, retain title to said oil and gas, subject to the terms of the negative easement prohibiting the drilling or deepening of any well for the purpose of producing oil and/or gas, provided, however, that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from locations above the 325 ft. elevation traverse, acquired by Declaration of Taking Nos. 2 and 3.

[REFERENCES TO OTHER TRACTS OMITTED]

5. The property so to be taken is described in the Exhibit "A" hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned are:

(a) Porciones 14 through 17, Zapata County, Texas, the persons setout after each parcel in Declaration of Taking No. 1, filed in this cause.

[OTHER SUBPARAGRAPHS OMITTED]

7. The State of Texas and the County of Zapata, Texas, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be

others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Others".

The interest sought to be condemned in tracts above described is subject to existing easements for public roads and public utilities.

Wherefore, the plaintiff demands judgment that the property be condemned and that such compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

BRIAN S. ODEM,
UNITED STATES ATTORNEY

ARTHUR L. MOLLER,
Special Assistant

By: <SIGNED>
CHARLES N. FANSLER,
Special Assistant

Trial by jury of the issue of just compensation is demanded by plaintiff.

<SIGNED>
CHARLES N. FANSLER,
Special Assistant

EXHIBIT "A"

TRACT A

51,031 acres of land, more or less, in Zapata County, Texas, situated within Porciones 14 through 36, inclusive, and being all of Tract A, described by metes and bounds in Exhibit 1 attached to the original Petition in Condemnation filed in this cause, to which reference is here made, save and except Tract E in Porciones 14 through 36, hereinafter described, and shown on Exhibit "D" attached hereto.

[REFERENCES TO OTHER TRACTS OMITTED]

EXHIBIT "B"

Boundary of Lands to be Acquired in Zapata County, Texas for Reservoir.

[LEGAL DESCRIPTION OMITTED]

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APPENDIX J

Relevant Portions of *Amended Petition in Condemnation No. 12*
Vol. 4, Docket 15, Page 353

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
Vs.	§	CIVIL ACTION NO. 529
	§	AMENDED PETITION IN CONDEMNATION NO. 12
85237 ACRES OF LAND, MORE OR LESS, IN ZAPATA COUNTY, STATE OF TEXAS, FLUMENCIO MUNOZ, ET AL.	§	(Additional Parties for all Parcels)
Defendants	§	

***

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS:

NOW COMES the United States Of America by Malcolm R. Wilkey, United States Attorney for the Southern District of Texas, and Robert M. McKee, Attorney, Department Of Justice, and files its Amended Petition in Condemnation No. 12:

1. Paragraph No. 6 of Amended Petition in Condemnation No. 3 is amended by adding a sub-paragraph to be numbered (w) and to read as follows: The persons set out below, whether such names be repeated or not, may have or claim an interest in and to each or every parcel of land described in Amended Complaints

Numbers 3, 4, 5, 6, 7, 8, and 11:

J. N. Abel and wife, Vernice Abel, Eugene T. Adair, Maurice M. Alexander and wife, Aurora Alexander, Alice Bank and Trust Company, W. W. Allen, Rodolfo Alvares, Anderson-Prichard Oil Corporation, Lorraine Andrews, Robert U. Andrews, Worth B. Andrews, Sr., and wife Stella Andrews, Worth B. Andrews, Jr., Everett Anglin, Pedro Armengol and wife, Mrs. Pedro Armengol, Aurora C. Arredondo, Angela Pena de Avalos and husband, Porfirio Avalos, Logan H. Bagby, Charles Baker, Joan K. Ball, T. R. Banks, Eunice Ruth Barbee and husband, Fred E. Barbee, Ed Barnett and wife, Marguerita Harrington Barnett, Earl K. Batema, Gus A. Becker, Anastasia Pena de Benavides and husband, Pedro Benavides, Arturo Benavides, Trustee for Zapata C. Indep. Sch. Dist., Celia Gonzalez Benavides and husband, Heberto Benavides, Celia M. de Benavidez and husband, Juan Benavides, Jr., Guadalupe Benavides, Lydia Guadalupe Benavides, Mauro Benavides and wife, Lydia S. Benavides, Raul Benavides, Servando Benavides, Roy A. Berentz Company, Inc., Floyd Billings and wife, Norma B. Billings, Robert L. Bobbitt, Bonnie B. Bobo, Mrs. E. G. Bond and husband, E. G. Bond, L. Braeter, Billy Bridewell, John H. Jacobs, Marcus Jacobs, A. Stone, also known as A. Stone James and husband, A. James, William G. James, William J. James, C. E. Jamison, Alexander Johnson, Carl A. Johnson, Fred D. Johnson, Harvey Johnson, Lutz Johnson, Margaret L. Johnson, Robert G. Johnson, R. H. Johnson, S. P. Johnson, William A. Joines, A. C. Jones, Federico Jones, John Otis Jones, Juan Jones, L. L. Jones, J.

A. Jucker, Walter Journeay, Kaercher and Company, Incorporated, Oscar T. Kalin, William M. Keating, H. C. Keefe, George L. Kelley, A. M. Keneipp and Son, C. D. Kennedy, Max J. Kennedy, H. F. Kennerley, Elmer Kenney, William M. Kerlin, Jas. E. Kervin, Fred L. Ketch, D. Kilvroff, H. P. King, H. T. King, N. R. King, Nat B. King, Walter Kingsley, Katherin Kinney and husband, _____, Kinney, C. T. Kirthart, Mary La Rue Klepper, Thomas N. Klepper, J. J. Klinge, John K. Know, August Koelle, O. H. Kock, John Kopera, Martin Kowalske, John C. Know, John C. Knox, A. J. Knutson, Herman Kremer and wife, Mrs. Herman Kremer, W. E. Kreps, Charles A. Kumke, George H. Kupfrain, George H. Kupfrian, Ernest Kunzman, Mrs. M. V. Labarre, F. G. Lamson, Susie McMullen Langille and husband, George M. Langille, Allen L. Langley, J. A. Langton, T. M. Langton, Frank Lankiweicz, Lanroy Incorporated, Ira B. Laughlin, Edward C. Lawson, Adelina Guerra Leal, Cleofas Guerra Leal and husband, Julio Leal, Simon Leal, John H. Leavell, W. H. Ledman, Lenoir M. Josey, Incorporated, Damasio de Leon, Delfino de Leon, Delfina de Leon, Donaciano de Leon, Geo. J. Lescho, P. R. Lewellen, C. H. Lewis, Carl O. Lewis, J. A. Lewis, R. Lewis, R. B. Lewis, Robt. Lewis, Henry P. Lincoln and wife, Annie M. S. Lincoln, A. A. Lindsey, J. J. Lindsey, Wm. J. Link, Henry A. Linn, J. W. Little, Gus A. Llambias, Bacilia Rodriguez Longoria, Camilo Longoria, Felix Longoria, Fidel Longoria, Rovinson Longoria, B. H. Loomis, Antonio Lopez, Eulalia Vela de Lopez, Eufracia Ramirez Lopez and husband, Guadalupe Lopez, Evangalina Barbareno de Lopez and

husband, Gustavo Lopez, Felipe Lopez, Jesus Lopez, Jose Lopez, Juan Lopez, Luciano Lopez, Nicolas Lopez, Olibia Benavides Lopez and husband, Aurelio Lopez, Romana B. de Lopez, George W. Lovejoy, Sarah Redmond Lovenskiola and husband, Perry G. Lovenskiola, Alfred R. Loweth, Antonio Lozano, Felipa Ramirez Lozano and husband, Tiburcio Lozano, Librado Lozano, Manuela Lozano, Manuela Pena Vda. de Lozano, Teodora R. Vda. Lozano, Teodoro Lozano, Adolfo Lugo, Angela Lugo, Asuncion Lugo, Eliza Lugo, Francisca Lugo, Francisco Lugo, Jesus Lugo, Jose Angel Lugo, Jose Angel Lugo and Refugio Campos, Juan Lugo, Manuel Lugo, Manuel Lugo and wife, Cipriana Robles Lugo, Pedro Lugo, Porfirio Lugo, Refugia C. Vda. de Lugo, Serafin Lugo, Tomas Lugo, Trinidad Lugo, Matthew Lukasiuk, Emil Lund, Lundell Royalty Company, Edwin F. Lutz, Olaf O. Lying, Olaf O. Lyng, Ida M. Lytle, May F. McAllister, Michael McCabe, James G. McCarrick, W. E. McCarson, C. E. McCaughey, C. L. McCaughey, W. R. McClanahan, Arturo McCoy, Jacinta Lugo McCoy and husband, William McCoy, Maurice S. McCoy, Nellie McCoy, Robert McCoy, William McCoy, Jr., J. M. McCulloch, W. H. McCullough, John F. McDermott, Juana Y. McDermott, Tomas McDermott, also known as Thomas C. McDermott, William McDonald, Jr., J. K. McFarlane, Lillian B. McGill, A. C. McGilton, J. R. McGinley, D. M. MacGregor, James McHattie, J. H. McKay, C. A. McLane, Ella H. McLean, A. R. McLennan, Individually and as Trustee, H. J. McMullen, Susie McMullen, McMullen Oil and Royalty Company, Incorporated, Sue McMullen, C. D. McQueen,

W. S. McRoberts, John E. McVicar, Freeman McWhorter, C. O. Maddox, Vird L. Mahurin, Majestic Royalties Company, Percy Mallett, W. H. Maney, Ollie M. Marquess, Christian R. Martin, Robert Lee Martin, Adolfo Martinez, Anita Carrasco Martinez and husband, Crispin Martinez, Antonio Martinez, Celsa Rodriguez Martinez and husband, Zaragoza Martinez, Emilia Longoria Martinez and husband, Margarito Martinez, Epitacia Botello de Martinez and husband, Francisco Martinez, Eufemia Rodriguez Martinez and husband, Zaragosa Martinez, Gregoria Martinez and husband, Pablo T. Martinez, Guadalupe Barbareno de Martinez and husband, Juan Manuel Martinez, J. A. Martinez, Juan Manuel Martinez, Matilde Martinez, Narciso Martinez, Pablo Martinez, Pablo T. Martinez and wife, Gregoria Garcia de Trevino Martinez, Zaragoza Duran Martinez, Ewing Mason, Mirian S. Mason, Myrtle M. Mason, Ralph S. Mason, John R. Mast, M. L. Massingill, James L. Matthews, J. R. Maxwell, William Mayne, E. E. Mayo, Minnie I. Meacham, B. C. Mead, Antonio G. Medina and wife, Hermelinda Medina, Valentin Medina and wife, Celsa Escamilia Medina, F. Ernest Mehlhorn, Wm. E. Mehlich, William O. Mehlich, Jose Mendoza and wife, Rita G. Mendoza, Ella Mercer, Edwin Merrithew, Fred W. Mertz, Jr., Henry Meyer, Marciala S. Meza and husband, Sabas Meza, Paul Ellwood Middleton and wife, Sophie Walther Middleton, Midfield Oil Royalties of Texas, Midwest Oil Corporation, August Mihleisen and wife, Harriet Mihleisen, Abe Miller, Wm. G. Miller, Con Mims, Homer E. Minor, Mille C. Moake, Thomas J. Moake, Trissy B. Moake and wife, Daisy Puckett

Moake, Henry Mol, Monarch Oil and Royalty Corporation of Texas, Winniford Montague, Manuela Rodriguez Vda. de Montemayor, R. R. Moodie, A. V. Moore, Susan Moore, Bernardo Morales, Crisanto Morales, Jose Maria Morales, Olivia Morales, Rose A. Moran, Angelita Rodriguez Vda. de Morano, Jose Moreno, Librada Moreno, Martin Moreno, Paula Rodriguez Moreno and husband, Simon Moreno, Ramirez, Teodulo Ramirez and wife, Refugio Benavides Ramirez, Teresa Vela de Ramirez and husband, Manuel R. Ramirez, Cipriano Ramon, Cipriano Ramon and wife, Maria Ramon, Francisca R. Vda. de Ramon, Isidoro Ramon, Juan Ramon and wife, Maria C. Ramon, Rafael Ramon, D. E. Reynolds and husband, Jack Reynolds, Olivia Hernandez Ruiz and husband, Del Ruiz, Elida Ramirez de Saenz and husband, Juan B. Saenz, Luisa Calleja de Salas and husband, Jose Salas, Pedro Salas and wife, Maria de Salas, Prudencio Salas and wife, Lucrecia de Salas, Gregoria Calleja Vda. de Salinas and husband, Felipe Salinas, Octavia Salinas, Santiago Salinas, Fidencio Serna, Guadalupe Serna, Mauricia Serna, Refugio Serna and wife, Mrs. Refugio Serna, Ralph B. Shanks, Alberta de Silva, George Smelsey, Stella G. Smeltz, South Texas Gas Company, Sofia Valls Stewart and husband, E. H. Stewart, Agnes Garcia Tejeda and husband, Severiano Tejeda, Maria Garcia Terrazas and husband, David Terrazas, Anatelo Trevino and wife, Guadalupe Trevino, Beatriz C. de Trevino and husband, Primitivo Trevino, Lucrecia Gonzalez de Trevino, Petra C. Trevino, and husband, Ted Trevino, Rafael Trevino, Irene Trub and husband, Roberto Trub, Ignacio Uribe, Jose

Angel Uribe, United Gas Company, Avelina Valls, David Vela, David Vela and wife, Refugia Garza Vela, Domingo Vela and wife, Refugia Cuellar Vela, Erasmo Vela, Genoveva Vela, Genoveva Hernandez Vela, Gertrudis Vela and husband, Juan Gonzalez Gutierrez, Gordiano Vela and wife, Manuela Ramirez Vela, Isidro Vela and wife, Aurelia Cuellar, Jose Maria Vela and wife, Rafael Flores, Julian Vela and wife, Evita Cuellar, Manuela Vela, Santiago Vela, Santiago Vela and wife, Candelaria Ramirez Vela, Teodoro Vela and wife, Refugia Cuellar Vela, Ysidro Vela, Adela Garcia Vidaurri, Celso Vidaurri, Jr. and wife, Mabel L. Vidaurri, Celso Vidaurri, Manuel Vidaurri and wife, Azucena P. Vidaurri, Rafael Vidaurri and wife, Cristina de la Pena Vidaurri, Berta C. Villarreal and husband, Rodolfo L. Villarreal, Jose Maria Villarreal, Juan Villarreal, Manuela Vela Villarreal and husband, Florencio Villarreal, Evilia Hernandez Watson, Park Weaver, Individually and as Trustee under the will of John Warner Hobart, W. D. Workman, George E, Young, J. E. Young, Ruth B. Zeller, Eugenio Zuniga and wife, Lupe Bravito Zuniga, Herlinda Garcia Zuniga and husband, Antonio Zuniga.

In all other respects the Amended Petition in Condemnation, as otherwise amended, remains the same.

Wherefore, the Plaintiff prays, as in its Original Petition in Condemnation, for condemnation.

This the <u>6TH.</u> day of March, 1956.

UNITED STATES OF AMERICA, Plaintiff

MALCOLM R. WILKEY
UNITED STATES ATTORNEY

By:

<SIGNED>
Charles L. Short,
Assistant United States Attorney

<SIGNED>
Charles N. Fansler,
Assistant United States Attorney

<SIGNED>
Robert M. McKee,
Attorney, Department of Justice

APPENDIX K

Copy of Public Notice 131;
Delegation of Authority 73 from the
Department of State, signed by
John Foster Dulles, Secretary of State,
dated October 19, 1953, which appears
on page 6806 of Volume 18, Number 211
from the Federal Register,
dated October 28, 1953

DEPARTMENT OF STATE

[Public Notice 131; Delegation of Authority 73]

UNITED STATES COMMISSIONER, INTERNATIONAL BOUNDARY AND WATER COMMISSION, UNITED STATES AND MEXICO

DELEGATION OF CERTAIN AUTHORITY

Pursuant to the authority vested in the Secretary of State by section 4 of the act of Congress approved May 26, 1949 (63 Stat. 111), and in accordance with the act approved February 26, 1931 (46 Stat. 1421), and acts supplementary thereto and amendatory thereof, and under the further authority of the act approved August 19, 1935, as amended (49 Stat. 660, 1370), and the Treaty between the United States of America and Mexico concluded February 3, 1944, for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, and the Protocol signed November 14, 1944, in connection therewith (59 Stat. 1219), and executive orders, and the American-Mexican Treaty Act of 1950, approved September 13, 1950 (64 Stat. 846), as well as the act approved July 9, 1947 (61 Stat. 279), the act approved June 3, 1948 (62 Stat. 305), the act approved July 2[illegible], 1949 (63 Stat. 447), and the act approved September 6, 1950 (64 Stat. 595), the United States Commissioner, International Boundary and Water Commission, United States and Mexico, or in the absence of such Commissioner, the officer of the United States Section of the Commission who shall be designated by the Department of State as the officer in charge thereof, is hereby authorized in every case in which the Secretary of State is authorized to acquire by condemnation, under judicial process, any land or easement or right-of-way in land in connection with the construction of the dams and reservoirs provided for under the above-mentioned treaty of February 3, 1944, and the Secretary of State shall have determined previously the lands, easements and rights-of-way in land which in his opinion it is necessary and advantageous to so acquire, to sign, in behalf of the Secretary of State, letters to the Attorney General requesting him to cause proceedings to be commenced for condemnation of the said lands or easements or rights-of-way in land.

The United States Commissioner or, in the absence of such Commissioner, the officer in charge of the United States Section of the Commission is further authorized, in any case in which a petition in condemnation has been or may hereafter be filed for the acquisition of lands or easements or rights-of-way in land in connection with the construction of the dams and reservoirs provided for under the above-mentioned treaty of 1944, to sign, in behalf of the Secretary of State, declarations of taking of such lands, and letters to the Attorney General requesting the filing of such declarations, when in the opinion of the United States Commissioner, International Boundary and Water Commission, United States and Mexico, or in the absence of such Commissioner, in the opinion of the officer in charge of the United States Section of the Commission, the taking of such lands or easements or rights-of-way in such land is necessary and desirable.

The United States Commissioner or, in the absence of such Commissioner, the officer in charge of the United States Section of the Commission is further authorized to sign, in behalf of the Secretary of States, deeds and other instruments which are necessary for the disposition under the provisions of the act of Congress approved August 27, 1935 (49 Stat. 906) as amended (53 Stat. 841), of any lands heretofore or hereafter acquired under any act, executive order, or treaty, in connection with projects, in whole or in part, constructed or administered by the Secretary of State through the said Commissioner when such lands are no longer needed.

The United States Commissioner or, in the absence of such Commissioner, the officer in charge of the United States Section of the Commission is also authorized to make on behalf of the Secretary of State recommendations to the Department of Justice concerning offers of settlement which may be made in connection with any petition in condemnation which has been or may hereafter be filed for the acquisition of any land or easement or right-of-way in the land found by the Secretary of State to be necessary in connection with the construction of the dams and reservoirs provided for under the above-mentioned Treaty of February 3, 1944.

[SEAL]

JOHN FOSTER DULLES
Secretary of State

October 19, 1953.

[F.R. Doc. 53-9101; Filed, Oct. 27, 1953; 8:47 a.m.]

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APPENDIX L

Federal Rules of Civil Procedure
Involved in the Case which are Too Lengthy
for Inclusion in the Body of the Petition

APPENDIX L

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED IN THE CASE WHICH ARE TOO LENGTHY FOR INCLUSION IN THE BODY OF THE PETITION

17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or Be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

RULE 71A. CONDEMNATION OF PROPERTY

(c) Complaint.

(1) Caption. The complaint shall contain a caption as provided in Rule 10(a), except that the plaintiff shall name as defendants the property, designated generally by kind, quality, and location, and at least one of the owners of some part of or interest in the property.

(2) Contents. The complaint shall contain a short and plain statement of the authority for the taking, the use for which the property is to be taken, a description of the property sufficient for its identification, the interests to be acquired, and as to each separate piece of property a designation of the defendants who have been joined as owners thereof or of some interest therein. Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned. All others may be made defendants under the designation "Unknown Owners." Process shall be served as provided in subdivision (d) of this rule upon all defendants, whether named as defendants at the time of the

commencement of the action or subsequently added, and a defendant may answer as provided in subdivision (e) of this rule. The court meanwhile may order such distribution of a deposit as the facts warrant.

(3) Filing. In addition to filing the complaint with the court, the plaintiff shall furnish to the clerk at least one copy thereof for the use of the defendants and additional copies at the request of the clerk or of a defendant.

(d) Process.

(1) Notice; Delivery. Upon the filing of the complaint the plaintiff shall forthwith deliver to the clerk joint or several notices directed to the defendants named or designated in the complaint. Additional notices directed to defendants subsequently added shall be so delivered. The delivery of the notice and its service have the same effect as the delivery and service of the summons under Rule 4.

(2) Same; Form. Each notice shall state the court, the title of the action, the name of the defendant to whom it is directed, that the action is to condemn property, a description of the defendant's property sufficient for its identification, the interest to be taken, the authority for the taking, the uses for which the property is to be taken, that the defendant may serve upon the plaintiff's attorney answer within 20 days after service of the notice, and that the failure so to serve an answer constitutes a consent to the taking and to the authority of the court to proceed to hear the action and to fix the compensation. The notice shall conclude with the name of the plaintiff's attorney and an address within the district in which action is brought where the attorney may be served. The notice need contain a description of no other property than that to be taken from the defendants to whom it is directed.

(3) Service of Notice.

(A) Personal Service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with

Rule 4 upon a defendant whose residence is known and who resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States.

(B) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that the attorney believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed the defendant's place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally serviced as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

(4) Return; Amendment. Proof of service of the notice shall be made and amendment of the notice or proof of its service allowed in the manner provided for the return and amendment of the summons under Rule 4.

(f) Amendment of Pleadings. Without leave of court, the plaintiff may amend the complaint at any time before the trial of the issue of compensation and as many times as desired, but no amendment shall be made which will result in a dismissal forbidden by subdivision (I) of this rule. The plaintiff need not serve a copy of an amendment, but shall serve notice of the filing, as provided in Rule 5(b), upon any party affected thereby who has appeared and, in the manner provided in subdivision (d) of this rule, upon any party

affected thereby who has not appeared. The plaintiff shall furnish to the clerk of the court for the use of the defendants at least one copy of each amendment and shall furnish additional copies on the request of the clerk or of a defendant. Within the time allowed by subdivision (e) of this rule a defendant may serve an answer to the amended pleading, in the form and manner and with the same effect as there provided.